

No.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION III

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IN RE THE PERSONAL RESTRAINT PETITION OF:

**MICHAEL SUBLETT,**

PETITIONER.

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**PERSONAL RESTRAINT PETITION**

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A. STATUS OF PETITIONER

Michael Sublett (hereinafter “Sublett”) challenges his Thurston County Superior Court judgment of conviction for murder and his subsequent life sentence as a persistent offender. Mr. Sublett (DOC #884297) is currently incarcerated at the Washington State Penitentiary in Walla Walla, Washington. This is Mr. Sublett’s first collateral attack on this judgment of conviction.

A. FACTS

*Procedural History*

Michael Sublett was charged in Thurston County by an Information alleging murder which was filed on February 12, 2007. (Thurston County Case No. 07-1-00312-0). Mr. Sublett was convicted by a jury that returned its verdicts on June 18, 2008. On July 23, 2008, Mr. Sublett was sentenced to life in prison as a persistent offender.

Sublett filed a notice of appeal on July 23, 2008. His conviction and sentence were affirmed by this Court on May 18, 2010. 156 Wash.App. 160, 231 P.3d 231 (2010). The Washington Supreme Court accepted review and affirmed. 176 Wash.2d 58, 292 P.3d 715 (2012). The Washington Supreme Court issued its mandate on February 12, 2013.

This Personal Restraint Petition (PRP) timely follows.

*Facts*

The Washington Supreme Court described the facts as follows:

Petitioners Sublett and Olsen, along with a third person, April S. Frazier, were convicted of robbing and murdering victim Jerry Totten. Frazier had met Totten at an Alcoholics Anonymous meeting. Frazier needed housing and Totten offered her the use of a trailer on his property. He also allowed her to use the laundry facilities within his own home. Frazier's boyfriend, Sublett, was generally welcome as well. Totten was generous in assisting Frazier, giving her gifts of money as well as a place to live, and treated her, in her words, as a granddaughter. Despite this, Frazier and Sublett began stealing from Totten in November 2006. In January 2007, the two took Totten's wallet, cell phone, and checkbook. In total, Frazier and Sublett stole over \$51,000 from Totten.

Olsen was a friend of Frazier's. On January 29, 2007, Frazier and Sublett bailed Olsen out of jail, using \$1,000 of Totten's money, after Olsen agreed to perform a "job" for them. The three went to a hotel and used methamphetamine. At this point in the story, the accounts differ. According to Frazier, all three went to Totten's together. She knocked on the front door, and Totten let her in. She then went to the laundry room to finish her laundry, the alleged reason for the visit, and let Sublett and Olsen in through the adjacent backdoor. The two men proceeded to beat Totten with a baseball bat they took from the laundry room. Frazier heard Totten's moans but did not witness the violence herself. A forensic pathologist testified Totten died of manual strangulation.

FN1. Frazier agreed to testify against Sublett and Olsen in exchange for a plea deal. Sublett did not testify but generally denied the crimes. Olsen's testimony, to the extent that it differed from Frazier's, was uncorroborated, although consistent with his prior statements to investigators.

According to Olsen, Frazier and Sublett left the hotel for a few hours. When they returned to pick up Olsen, they were agitated and angry. The three went to Totten's home. Totten was completely covered by blankets on a recliner when Olsen arrived, and Olsen was not sure whether the victim was alive or dead. He did not check. The three proceeded to loot Totten's home for valuables. At this point, the two stories merge back together.

Olsen was upset, and he and Sublett went for a drive to calm down. Olsen claims Sublett threatened him with a gun, saying Olsen worked for Sublett now. Frazier also testified that Sublett threatened

Olsen with a gun both at Totten's home and when they were back at the hotel. The following day, the three returned to Totten's home and moved his body. They put the body in the back of one of Totten's trucks, that had a canopy, and covered it with various boxes and stuffed animals. Olsen and Sublett then drove out to the Old Olympic Highway and abandoned the truck on an embankment.

Frazier confessed a version of this story to Elsie Pray-Hicks a few days later. Pray-Hicks reported the crime to police a week after that. Frazier and Sublett were arrested in Las Vegas, and Olsen was arrested in Olympia. Sublett and Olsen were charged with premeditated first degree murder and, alternatively, felony murder. The two, over Sublett's objection, were joined for trial.

Sublett was convicted of both premeditated first degree murder and felony murder. He was sentenced to life without the possibility of release under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, based on prior out-of-state convictions found comparable to Washington strike offenses.

Additional facts are found in the sections below and in the appendix to this petition.

B. ARGUMENT.

1. PROSECUTORIAL MISCONDUCT DURING CLOSING EXACTLY LIKE THE MISCONDUCT IN *GLASMANN* MANDATES REVERSAL.
2. MR. SUBLETT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S FLAGRANT MISCONDUCT.

The trial deputy whose PowerPoint alteration of a booking photo by adding "GUILTY" in red in *PRP of Glasmann*, 175 Wash.2d 696, 286 P.3d 673 (2012), employed the same technique in this case. As Mr. Sublett's sworn declaration provides, during closing argument the prosecutor

exhorted jurors to find Mr. Sublett guilty and then emphasized the point by displaying Mr. Sublett's booing photo on an approximately 6x6 foot screen. Over Mr. Sublett's face, the prosecutor added a prominent, red "GUILTY."

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wash.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984). "A '[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.' " *State v. Monday*, 171 Wash.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wash.2d 66, 71, 298 P.2d 500 (1956); see *State v. Reed*, 102 Wash.2d 140, 145–47, 684 P.2d 699 (1984)).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wash.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," *State v. Casteneda–Perez*, 61 Wash.App. 354, 363, 810 P.2d 74 (1991); *State v. Huson*, 73 Wash.2d 660, 663, 440 P.2d 192 (1968). "The prosecutor should not use arguments

calculated to inflame the passions or prejudices of the jury.” American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wash.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wash.2d 504, 755 P.2d 174 (1988).

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *Thorgerson*, 172 Wash.2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wash.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Because Mr. Sublett’s counsel failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wash.2d at 443; *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994). Alternately, Sublett needs to show both deficient performance and a reasonable likelihood of a different outcome in order to establish ineffective assistance of counsel under the Sixth Amendment.

This case is squarely controlled by *Glasmann*. In fact, the error is indistinguishable. In *Glasmann*, the Washington Supreme Court held the “prosecutor's presentation of a slide show including alterations of

Glasmann's booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct that requires reversal of his convictions and a new trial, notwithstanding his failure to object at trial.” 175 Wn.2d at 714. The Court found that Glasmann was prejudiced and reversed all of his convictions, including crimes that he admitted and where, according to the dissent, “the evidence was [] overwhelming, because “it is substantially likely that the jury's verdict were affected by the prosecutor's improper declarations that the defendant was “GUILTY, GUILTY, GUILTY!” *Id.*

The Washington Supreme Court thoroughly condemned the prosecutor's PowerPoint slide in *Glasmann*. “The case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here. We hold that the prosecutor's misconduct, which permeated the state's closing argument, was flagrant and ill intentioned.” *Id.* at 707. “Indeed, here the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence.” *Id.* at 706. The Washington Supreme Court also reaffirmed “that a prosecutor must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations.” *Id.*

“Moreover, the misconduct here was so pervasive that it could not have been cured by an instruction.” *Id.* at 707. “Highly prejudicial images

may sway a jury in ways that words cannot. Such imagery, then, may be very difficult to overcome with an instruction. Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented.” *Id.* at 707-08.

The slide in Mr. Sublett’s case was, legally speaking, no different than the condemned slide in *Glasmann*. Likewise, Mr. Sublett was prejudiced. Indeed, the State should not be heard to complain that its closing argument which was delivered in order to convince jurors to return a guilty verdict was not persuasive.

Indeed, the State should confess error.<sup>1</sup>

3. MR. SUBLETT’S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN SUBLETT WAS FORCED TO WEAR A SHOCK DEVICE ONLY BECAUSE HE WAS ON TRIAL FOR MURDER.
4. MR. SUBLETT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE SHOCK DEVICE.

### *Facts*

During trial, Mr. Sublett was required to wear a leg brace and a shock device called the “Band It.” No hearing was held regarding use of the device. As a result, no showing was made to show any individualized security need. Instead, Sublett was told that he must wear the device simply because of the nature of charges against him. Although Sublett told

his attorney about the shock device and asked if he could attend his own trial without the threat of tortuous injury, counsel did not bring the matter to the court's attention.

Consequently, Sublett had difficulty concentrating—listening to the testimony of the witnesses against him. He adopted a demeanor that most likely suggested to jurors that he was unconcerned and indifferent to the terrible events described at trial. Finally, the fear of getting shocked and defecating on himself in front of his jury substantially interfered with Mr. Sublett's ability to consult with counsel.

In addition, the jail officers remained close to Sublett while he was at counsel table. An observant juror could clearly discern that Sublett was being controlled by an electronically activated device.

This Court should either remand this claim for an evidentiary hearing or, if the State does not dispute the material facts, should reverse and remand for a new trial. That hearing should include a determination of whether jurors knew Sublett was forced to wear a security device.

### *Argument*

In a courtroom, a defendant is defending his constitutional rights. A fair and orderly judicial proceeding is one of the most important institutions of our society.

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<sup>1</sup> It is disappointing that the State did not inform defendants who were subject to this prosecutor's "technique" that they may have a claim of error.

*Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1262 (C. D. Cal. 1999) (overruled in part by *Hawkins v. Comparet-Cassani*, 251 F.3d 1230 (9<sup>th</sup> Cir. 2001)).

*The Court Did Not Conduct the Hearing Necessary to Authorize the Stun Belt.*

The Supreme Court has recognized that the use of physical restraints is an “inherently prejudicial practice” which raises a number of constitutional concerns. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). In particular, even much less severe restraints may impede the defendant's ability to communicate with his counsel and to participate in his defense. *Illinois v. Allen*, 397 U.S. 337, 344 (1970). For these reasons, the use of physical restraints is justified only when the judge holds a hearing and makes an individualized finding of necessity—and then can only authorize the least restrictive restraint necessary to insure safety. *Deck v. Missouri*, 544 U.S. 622 (2005)

The need for a trial judge to conduct a hearing prior to authorizing the use of restraints is similar to the requirement that a judge must always conduct a hearing prior to closing the courtroom, and then can only authorize the least restrictive closure necessary to protect a compelling state interest. Compare *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995); *Wrinkles v. Buss*, 537 F.3d 804, 814 (7th Cir. 2008) (counsel's failure to object to stun belt was error because “particularized reasoning

must support a decision to restrain a defendant”); *United States v. Durham*, 287 F.3d, 1297, 1306-7 (11<sup>th</sup> Cir. 2002) court must “make factual findings about the operation of the stun belt,” “assess whether an essential state interest is served,” and “consider less restrictive methods of restraint”). In both cases, the issue involves the judge’s regulation of her courtroom. In both cases, a hearing is required prior to authorizing an action (closure of the use of a restraint).

In the case of the use of an unjustified restraint, reversal should be required where no hearing was held and where it is clear that the use of the restraint was unjustified. That is because in both instances the harm to essential trial rights is inherent.

*Mr. Sublett’s Ability to Concentrate and To Assist Counsel Was Impaired by the Unwarranted Use of the Stun Belt. Even “Very Little” Impairment Merits Reversal.*

A shock or stun belt is an electronic device that is secured around a prisoner's waist, and when activated, “the belt delivers a 50,000-volt, three to four milliampere shock lasting eight seconds.” *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1234 (9th Cir.2001). The shock administered “causes incapacitation in the first few seconds and severe pain during the entire period,” may also cause “immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal.” *Gonzalez*, 341 F.3d at 899 (quoting *Hawkins*, 251 F.3d at 1234 and *People v. Mar*, 28 Cal.4th

1201, 1214, 124 Cal.Rptr.2d 161, 52 P.3d 95 (2002) (internal citation and quotation marks omitted)). The wearer generally is knocked to the ground by the shock and convulses uncontrollably. *Mar*, 28 Cal.4th at 1215, 124 Cal.Rptr.2d 161, 52 P.3d 95. Activation of a shock belt can cause muscular weakness for approximately thirty to forty-five minutes as well as heartbeat irregularities or seizures. *Mar*, 28 Cal.4th at 1214, 124 Cal.Rptr.2d 161, 52 P.3d 95. “Accidental activations are not unknown.” *Gonzalez*, 341 F.3d at 899 (citing *United States v. Durham*, 219 F.Supp.2d 1234, 1239 (N.D.Fla.2002) (reporting a survey that showed 11 out of 45 total activations, or 24.4%, were accidental)).

By forcing a defendant to wear a stun belt, state actors directly interfere with his mental state, inducing a constant fear of receiving 50,000 volts of electricity. There can be no question but that this fear necessarily chills the exercise of the defendant's trial rights, including altering his outward appearance and affecting his decision whether or not to testify, his ability to follow the proceedings, the substance of his communication with counsel, and his ability to actively cooperate with and assist counsel. How is a defendant to understand the constitutional assurance that he can, for example, consult with counsel, if the assurance comes at the price of unrelenting fear and uncertainty that the very act of consultation may be misinterpreted as “inappropriate behavior,” and precipitate a shock?

The use of stun belts risks “disrupt[ing] a different set of a defendant's constitutionally guaranteed rights,” than in the case of visible shackles. *United States v. Durham*, 287 F.3d 1297, 1305 (11<sup>th</sup> Cir. 2002) (stun belts may “pose[ ] a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles.”) In addition, the defendant’s overall participation in court proceedings may be adversely affected. “Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case.” *Id.*, 287 F.3d at 1306. “The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely hinders a defendant's participation in defense of the case, chilling that defendant's inclination to make any movements during trial – including those movements necessary for effective communication with counsel.” *Id.*, 287 F.3d at 1305 (internal punctuation omitted).

Other courts have found that stun belts create an anxiety impairing a defendant’s ability to testify on his own behalf, as well as his demeanor before the jury. *See, e.g., People v. Mar*, 52 P.3d 95, 104, 106 (2002) (“presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus [his] entire attention on the substance of the court proceedings, and affect [his] demeanor before the jury”).

In *Durham*, the court further explained the prejudice

A stun belt seemingly poses a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles. The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial—including those movements necessary for effective communication with counsel.

287 F.3d at 1305. The *Durham* Court continued:

Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of shackles may 'significantly affect the trial strategy [the defendant] chooses to follow.' A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense.

*Id.* at 1306.

*Interference with the Right to Be Present and to Assist Counsel Is Subject to Automatic Reversal*

The Supreme Court has stated that the "core purpose of the [Sixth Amendment right to] counsel guarantee was to assure 'assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309 (1973). The constitutional right to assistance of counsel includes the "opportunity for private and continual discussions between defendant and

his attorney during the trial.” *State v. Hartzog*, 96 Wash.2d 383, 402, 635 P.2d 694 (1981); *see also Geders v. United States*, 425 U.S. 80 (1976); *Perry v. Leeke*, 488 U.S. 272 (1989). And except for a limited right to control attorney-client communication when the defendant is testifying, any interference with the defendant's right to *continuously* consult with his counsel during trial is reversible error without a showing of prejudice. *Perry v. Leeke*, 488 U.S. 272 (1989).

Unjustified interference with the right to counsel constitutes a structural error. *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (“We have little trouble concluding that the erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.”) (citations and internal quotations omitted).

Once again, this Court should either remand for an evidentiary hearing or reverse and remand for a new trial.

5. MR. SUBLETT WAS DENIED HIS RIGHT TO TESTIFY.

Mr. Sublett did not testify at trial. During a break in closing argument, he told his attorney that he wanted to testify, urging his attorney to move to reopen and to inform the court that Sublett wanted to testify. In response, defense counsel did not move to reopen and did not inform the court of Mr. Sublett’s decision. If this Court does not find a violation of Mr. Sublett’s right to testify, it should consider Sublett’s alternate

framing—as a Sixth Amendment violation of his right to effective assistance of counsel.

A criminal defendant has both a state and federal constitutional right to testify on his or her own behalf. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (citing *Rock v. Arkansas*, 483 U.S. 44 (1987)). On the federal level, the defendant’s right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. *Robinson*, 138 Wn.2d at 758 (citing *Rock*, 483 U.S. at 51–52). And article I, section 22 of our state constitution explicitly protects a criminal defendant’s right to testify. *Robinson*, 138 Wn.2d at 758 (citing *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)). This right is fundamental and cannot be abrogated by defense counsel or by the court. *Robinson*, 138 Wn.2d at 758.

The ultimate decision whether or not to testify rests with the defendant and his waiver must be knowing, voluntary, and intelligent, although the trial court need not obtain such a waiver on the record. *Robinson*, 138 Wn.2d at 758–59 (citing *Thomas*, 128 Wn.2d at 558–59). A defendant’s right to testify is violated when an attorney uses threats and coercion against his client, or when the attorney flagrantly disregards the defendant’s desire to testify. *Robinson* (citing *United States v. Robles*, 814 F.Supp. 1233, 1242 (E.D.Pa.1993); *United States v. Butts*, 630 F.Supp. 1145, 1147 (D.Me.1986)). A court must distinguish between cases in which an attorney actually prevents a defendant from taking the stand

and cases in which counsel ‘merely advises the defendant against testify as a matter of trial tactics.’ *Robinson*, 138 Wn.2d at 763 (quoting *State v. King*, 24 Wn.App. 495, 499, 601 P.2d 982 (1979)). Where a defendant asserts facts suggesting that his attorney actually prevented him from testifying, an evidentiary hearing is appropriate.

A criminal defendant’s right to testify on his own behalf “is not without limitation”; it must sometimes “bow to accommodate other legitimate interests in the criminal trial process.” *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (internal marks and citations omitted). When considering rules that limit a defendant's right to testify, a reviewing court “must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.” *Id.* at 56.

The Fifth Circuit in *United States v. Walker*, 772 F.2d 1172 (5th Cir.1985), set out a list of factors to be considered in evaluating whether an abuse of discretion has occurred. At Roy E. Walker's trial, defense counsel told the jury in his opening statement that Walker would testify. *Id.* at 1175. The government concluded its case-in-chief faster than the defense anticipated. *Id.* Defense counsel called the witnesses who were present and then asked for a recess, which the court granted. *Id.* When the court reconvened, defense counsel stated that several of the defense witnesses still were not present. *Id.* The court asked whether the defense had any witnesses available and whether Walker himself was planning to testify. *Id.*

Walker informed the court that he would “like very much to have the opportunity to say something.” *Id.* Walker then described how upset and emotionally unstable he was at the time. He concluded, “I have so much pressure on me, Your Honor, that if I have to testify, if I'm forced to get on the stand right now, I-” *Id.* At this point, the court interrupted Walker saying, “I'm not going to force anybody to do anything.” *Id.* Walker then stated that he understood he would not be compelled to testify and informed the court, “I would love to testify. I would love to testify.” *Id.*

The court discussed with defense counsel the possibility of issuing subpoenas for some of the defense witnesses and then returned to the subject of whether Walker would testify. *Id.* at 1175-76. Defense counsel stated that, as of that moment, Walker was unsure whether he wanted to testify. *Id.* at 1176. Defense counsel explained: “His position, as I understand it, is he doesn't feel like he is emotionally prepared or is documentarily prepared that he can take the stand and present the documentation he needs to verify where he was on certain dates and he just doesn't feel like he could-you know, it would be a good idea to take the stand today, is essentially what he has told me.” *Id.*

Defense counsel then withdrew his request to have subpoenas issued. *Id.* The jury was brought in, and the defense rested. *Id.* The government called two rebuttal witnesses, and the evidence closed that afternoon, a Friday. *Id.*

On the following Monday, Walker informed defense counsel that he wanted to testify. *Id.* When the proceedings reconvened, defense counsel asked the court to reopen the evidence in order to let Walker testify. *Id.* The court refused. *Id.*

In reaching its conclusion that the district court had abused its discretion, the Fifth Circuit considered the following factors: (1) the timeliness of the motion to reopen, (2) the character of the testimony to be offered, (3) the effect of granting the motion to reopen, and (4) the reasonableness of the excuse for the request to reopen. *Id.* at 1177.

With respect to the first factor, the Fifth Circuit concluded that Walker's motion to reopen was made in a reasonably timely fashion since it had been made on the first day the proceedings reconvened after the evidence had closed. *Id.* at 1177-78. As to the second factor, the Court presumed the character of the testimony that would have been offered to be of “prime importance” because it was the testimony of the defendant himself. *Id.* at 1179. Examining the third factor, the Court concluded that there was “no indication” that reopening the evidence would have prejudiced the government, *id.*; however, there was reason to believe that the defendant had been prejudiced by the failure to reopen. *Id.* at 1183.

As to the government, the Court identified four possible sources of prejudice but decided none were present. *Id.* at 1180-81. First, neither closing arguments nor the jury instruction had taken place;

therefore, the “orderly flow” of the proceedings would not have been interrupted. *Id.* at 1180. Second, it did not appear that any of the government's witnesses had been released or had otherwise become unavailable. *Id.* The third and fourth potential sources of prejudice to the government from reopening involved the testimony of the government's rebuttal witnesses. The Court theorized that, having heard the testimony of the rebuttal witnesses, the defendant might have been able to “work his testimony around theirs,” explaining any discrepancies between the rebuttal witnesses' testimony and the defense's case. *Id.* The Court also reasoned that, because the defendant had learned what the rebuttal witnesses did not know, he could have “decide[d] as a strategic matter that it would be safe ... to testify to certain matters.” *Id.*

In Walker's case, the Fifth Circuit decided that those two types of prejudice were not present. *Id.* at 1181. On rebuttal, the government had presented “two comparatively insignificant witnesses.... Neither [of whose] testimony reasonably could have affected [Walker's] decision to testify or revealed significant information that would aid him in formulating his own testimony.” *Id.* The testimony of the rebuttal witnesses did not reveal any significant information that had not been revealed during the government's case-in-chief. *Id.* In addition, the comprehensive nature of the government's case-in-chief and the paucity of the defense case “was such that [Walker] would have anticipated very little in the way of rebuttal by the government”

and, thus, would have thought he could gain little strategic advantage from delaying his testimony. *Id.*

Though the government would not have been prejudiced by reopening the evidence, the Court concluded that Walker had been prejudiced by the failure to reopen. *Id.* at 1183. The government did not mention Walker's failure to testify in its closing statement, and the court instructed the jury not to hold Walker's failure to testify against him. *Id.* Nonetheless, Walker's failure to testify, after his attorney had stated that he would, may indeed have made a negative impression on the jury. *Id.* Because the government would have suffered no prejudice from reopening the evidence and Walker probably suffered prejudice from the failure to reopen, the Court found that this factor weighed in Walker's favor. *Id.* at 1179-83.

Concerning the final factor, the Fifth Circuit concluded that the reasonableness of Walker's excuse for requesting to reopen “mildly favor[ed] Walker's position, or at least [did] not point in the other direction.” *Id.* at 1183. When defense counsel asked the court to reopen the evidence, he explained that Walker had been “emotionally unable” to testify on the day the evidence closed. *Id.* at 1184. The district court asked Walker if he had wanted to testify the previous Friday, and Walker responded, “At that time, Your Honor, *I couldn't.*” *Id.*

In addressing the defense's motion to reopen before the district court, the government apparently conceded that Walker had not testified the previous Friday due to “his nervous condition.” *Id.* The Court concluded that this excuse “would not alone suffice to carry the day.” *Id.* at 1184. Yet when weighing this excuse in combination with the other factors, the Fifth Circuit held that the district court had abused its discretion by refusing to reopen the evidence to allow Walker to testify. *Id.*

After this Court remands for an evidentiary hearing, this Court should apply the factors identified in Walker and reverse. Mr. Sublett informed his attorney that he wanted to testify at a time when the Court had the discretion to reopen the case. The State would not have been prejudiced in any manner. In response, counsel did nothing—effectively refusing to bring a motion that could have been granted and thereby denying Mr. Sublett the right to testify—a decision that belonged solely to Sublett, not counsel. Because there is a reasonable likelihood that Sublett would have been permitted to testify, he was prejudiced by the loss of a right that he did not waive.

6. MR. SUBLETT WAS DENIED EFFECTIVE ASSISTANCE OF  
COUNSEL AT THE PLEA BARGAINING STAGE.

*Facts*

Prior to trial, but at a time when the State was aware of Mr. Sublett’s two California robbery convictions, the State offered Sublett a plea

agreement to a term of years that treated Sublett's California convictions as non-strikes. When counsel communicated the offer to Mr. Sublett, counsel did not warn Sublett that his California robbery convictions would likely be treated as "strikes," and did not tell Sublett that if he took the offer that State and Court were bound to treat the convictions as non-strikes. If Sublett had been given competent advice, there is a reasonable likelihood that he would have taken the State's offer.

#### *Argument*

In order to establish comparability, the State is required to prove facts establishing that the foreign crime is equivalent to a particular Washington crime. Given the State's proof requirement, plea bargaining over "comparability" is not any different than plea bargaining over a crime. The parties' agreement replaces the obligation or opportunity to prove facts. Consequently, the agreement binds a sentencing court.

Mr. Sublett's lawyer was unaware of the law. Consequently, he failed to tell Sublett that he could avoid a life sentence by taking the deal or face an almost certain life sentence if convicted at trial. Sublett's counsel did not understand or, at least, did not explain that a plea agreement treating a foreign conviction as not comparable to a strike eliminates a sentencing court's obligation to classify that conviction. Defense counsel did not communicate to Sublett that by accepting the State's agreement to treat a

prior foreign conviction as not comparable to a strike, no reviewing court could ever find the factual basis to conclude otherwise.

As a result of defense counsel's failure to inform Sublett, he rejected the plea offer. If Sublett had been given competent advice, there is at least a reasonable likelihood that he would have taken the offer.

Plea bargaining often involves an agreement by the parties relieving the State's obligation or opportunity to prove certain facts.<sup>2</sup> Sometimes those agreements involve facts that would ordinarily need to be proved at trial. Less commonly, the agreements involve facts that must be proved at a sentencing hearing. These agreements may not capture the "true" facts. Instead, they replace the need to prove facts with an agreed outcome. Most criminal matters are resolved this way. As the United States Supreme Court recently stated in *Missouri v. Frye*, \_\_ U.S. \_\_, 132 S.Ct. 1399 (2012): "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)(emphasis in original).

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<sup>2</sup> Under Washington law, a defendant can enter a plea to a crime or agree to a sentence enhancement even where there is no factual basis for the admission, provided the agreement is knowing and voluntary. *State v. Zhao*, 157 Wash.2d 188, 137 P.3d 835 (2006) (holding that a defendant can plead guilty to amended charges for which there is no factual basis, but *only* if the record establishes that the defendant did so knowingly and voluntarily); *State v. Majors*, 94 Wash.2d 354, 616 P.2d 1237 (1980) (a defendant can knowingly and voluntarily agree to a factually unsupported sentencing enhancement).

*Under Washington Law, The Parties Cannot Agree to Legal Error, But Can Agree to Forego Proof of Certain Facts.*

Washington currently employs “guideline” sentencing where, generally speaking, prior felony convictions that have been admitted or proven result in an increased “sentence range.” RCW 9.94A.525. Out-of-state convictions are classified according to the “comparable” offense definitions under Washington law. RCW 9.94A.525(3). Under Washington’s “persistent offender” or “three strikes” law, out-of-state convictions must be “comparable” to a crime classified as a “most serious offense” in Washington in order to be classified as a “strike.” RCW 9.94A.030(37).

Disputed issues regarding the existence and classification of a prior conviction are resolved after an evidentiary hearing at sentencing. RCW 9.94A.441. However, in most sentencing hearings the court is not required to resolve criminal history disputes.

That is because Washington law permits the parties to reach binding agreements where proof of *facts* is involved. Washington law does not permit the parties to agree to a *legal* error. This distinction is critical to resolution of the issue in this case.

To explain, a defendant cannot waive a legal error involving the scoring of criminal history because such a sentence lacks statutory authority. *State v. Wilson*, 170 Wash.2d 682, 688–89, 244 P.3d 950 (2010).

For example, if a prior conviction does not count as criminal history due to the passage of time (called “wash out”), the parties cannot agree to count that conviction and thereby bind the court. *In re Call*, 144 Wash.2d 315, 335, 28 P.3d 709 (2001) (Post-conviction challenge to an offender score where the parties mistakenly agreed to count a conviction that “washed out.” “The sentencing court is obligated to calculate the correct offender score and determine the correct standard range before imposing a sentence. It is legal error subject to review when that is not done.”); *In re Pers. Restraint of Goodwin*, 146 Wash.2d 861, 50 P.3d 618 (2002) (defendant did not waive his right to challenge his “offender score” where a prior conviction “washed out” even if he agreed to the offender score as part of plea agreement).

*Goodwin* clarified when, under Washington law, sentencing agreements are binding and when they are not. While the parties cannot agree to a legal error resulting in a miscalculation of the sentencing consequences, an “error” can be waived where it involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion. *Goodwin*, 146 Wash.2d at 874, 50 P.3d 618.

#### *Comparability Requires Proof of Facts*

Comparability analysis involves two steps—proof of facts and then classification of those facts under Washington law. *In re Lavery*, 154 Wash.2d 249, 255, 111 P.3d 837 (2005).

Like any allegation that involves proof of facts, the parties can reach an agreement removing that obligation. When a defendant affirmatively acknowledges that a foreign conviction is properly included in the offender score, the trial court does not need further proof of classification before imposing a sentence based on that result. *State v. Ford*, 137 Wash.2d 472, 483 n.5, 973 P.2d 452, 458 n.5 (1999).

In *State v. Ross*, 152 Wash.2d 220, 95 P.3d 1225 (2004), the Washington Supreme Court specifically rejected the defense argument that the State's failure to prove the comparability constitutes a “legal error” and can never be waived by agreement. That rule, explained the court, applies only to errors of law. An agreement regarding comparability removes the sentencing court’s obligation to consider further factual proof “after [the defendants] affirmatively acknowledged the comparability of those convictions.” 152 Wash.2d at 230, 95 P.3d at 1230.

Where there is no agreement, a defendant’s failure to object does not remove the State’s obligation of proof. In *Ford*, the defendant failed to object to the classification of out-of-state convictions. The Washington Supreme Court held that an objection to classification is not required in order to put the State to its proof. *Ford*, 137 Wash.2d at 483, 973 P.2d at 457. However, once again the Washington Supreme Court explained that when a defendant “affirmatively acknowledges” that a foreign conviction is properly included in the offender score, the trial court does not need further

proof of classification before imposing a sentence based on that score. *Id.*; *State v. Hickman*, 116 Wn.App. 902, 68 P.3d 1156 (2003); *State v. Hunter*, 116 Wn.App. 300, 301-02, 65 P.3d 371 (2003) (holding that a defendant can waive the right to appeal the determination of comparability because “[n]othing in *Goodwin* ... supports the proposition that the sentencing court must undertake a comparability determination despite the defendant's affirmative agreement with the State's classification.”). See also *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001) (a defendant’s “unchallenged acceptance” of a sentencing fact relieves both the trial and appellate court of any duty to examine that acceptance).

In *Hickman*, the Washington Court of Appeals explained “a defendant who stipulates that his out-of-state conviction is equivalent to a Washington offense has waived a later challenge to the use of that conviction in calculating his offender score.” *Id.* at 907; 68 P.3d at 1158.

Review of a contested comparability finding further reinforces its factual component. Because comparability involves proof of facts, like a sufficiency of the evidence challenge to a conviction, when a defendant raises a specific objection at sentencing and the State fails to respond with evidence regarding the defendant's prior convictions, then (if the scoring error is recognized on appeal) the State is held to the factual record it presented at the sentencing hearing. *State v. Mendoza*, 165 Wash.2d 930, 205 P.3d 113 (2009).

Sublett’s counsel explained none of this law to him. If he had, there is a reasonable likelihood that Sublett would not have gone to trial and “struck out.” This Court should remand this claim for an evidentiary hearing or, if the State does not contest the facts, reverse.

7. MR. SUBLETT IS ACTUALLY INNOCENT OF THE PERSISTENT OFFENDER FINDING.

Mr. Sublett was convicted in California of two counts of robbery. In both cases, he was convicted of more serious conduct than he actually committed. But for his California counsel’s deficient advice to plead guilty, there is a reasonable likelihood that Sublett would have been convicted of a less serious crimes—crimes that are not comparable to strikes.

The Washington Supreme Court recognized the existence of a claim of “actual innocence” of a persistent offender enhancement in *PRP of Carter*, 172 Wash.2d 917, 263 P.3d 1241 (2011). The Court found that the Petitioner in that case was not “actually innocent” reasoning that actual innocence is “factual innocence,” not “legal” non-comparability. Justice Stephens clarified the holding in a short concurring opinion:

With respect to the majority's description of the actual innocence doctrine, I also write separately to emphasize that it should not be read to suggest that “factual innocence” in the context of a persistent offender sentencing enhancement requires proof that the defendant did not commit *any* underlying offense. No party makes this argument. Rather, the State argues that proof of factual innocence required Mr. Ernest Carter to prove “that his California conviction was based on conduct that was not factually comparable to the crime

of assault in the second degree.” Suppl. Br. of Resp’t at 11. It would erode the very principle of recognizing actual innocence if the court’s decision were read to suggest that a defendant may be wrongfully sentenced as a persistent offender when, though actually innocent of a strike offense, he was “guilty of something.”

*Id.* at 935 (Stephens, J. concurring).

Mr. Sublett fits squarely into the actual innocence doctrine as defined in *Carter*. Sublett was twice convicted of robbery in California for somewhat similar behavior. Robbery is defined by California Penal Code (CPC) § 211 as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” Second degree robbery is all those instances which are not included as first degree. CPC § 212.5.

In both cases, Mr. Sublett took personal property from another. However, in neither case did Sublett use “force or fear,” to accomplish the taking. Instead, as Sublett’s declaration describes, he “tricked” tellers into opening a register and then quickly took money out of the till—without the threat of force or fear. Sublett’s convictions are for more serious conduct, a strike, than the crime he actually committed.

Under *Carter*, Sublett should be given an opportunity to prove that he is factually and actually innocent of persistent offender status. RAP 16.11.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should either grant Mr. Sublett's PRP or remand for an evidentiary hearing.

DATED this 11<sup>th</sup> day of February, 2014.

Respectfully Submitted:

/s/Jeffrey Ellis

Jeffrey E. Ellis #17139

*Attorney for Mr. Sublett*

Law Office of Alsept & Ellis

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## DECLARATION OF MICHAEL L. SUBLETT

I, Michael L. Sublett, declare:

1. I am the Petitioner in this PRP.
2. Prior to trial, my attorney told me the State had made a plea offer for approximately 24 years in prison. I don't remember exactly how much time the State offered. I just remember it was more than 20 years, which I understood was the mandatory minimum. At the time, the State and my attorney were aware that I had been convicted on two separate occasions of robbery in California.
3. My attorney did not tell me that my robbery convictions would likely count as strikes. My attorney did not tell me that if I took a deal where the State treated my robbery convictions as not comparable to strikes that those convictions could not be treated as strikes. If I had known that I could have avoided a life sentence by pleading guilty, I very likely would have accepted the plea bargain. I rejected the State's offer only because my attorney did not explain the law to me.
4. During trial I was forced to wear a shock device and a leg brace. The shock device was called the Band It. No court hearing took place to decide whether I should be forced to wear the shock device. I told my attorney I did not want to wear it.

5. During the trial, I was almost always in fear of getting shocked. As a result, I was not able to always concentrate on what the witnesses were saying. There were many times that I wanted to tell my attorney something about the witness or to get his attention, but was afraid to because I was afraid it would be misunderstood by the officers. For example, I kept my hands on the table when I wanted to raise my hand to signal my attorney.

6. Mostly, I just sat still and tried not to show emotion.

7. There were two officers in court with me. One controlled the device. It would have been pretty easy for jurors to figure out that the jail officers were controlling some sort of security device because you could see the officer with his hand near the control button.

8. During closing argument, the prosecutor used a PowerPoint presentation. Near the end, he did this dramatic thing where he put up my booking photo (along with my co-defendant) on a 6 foot by 6 foot screen. Then, he put the word "guilty" over my face in red. As I recall, he put a red circle with a red line through my picture and then wrote "guilty" over my face.

9. I was convicted in California of two robberies. In both cases, I pleaded guilty. In both cases, I stole money by tricking a teller to open the till and then quickly grabbing money. In neither case did I threaten to harm the person. In both cases, my attorneys in California told me that what I did was a robbery, so I pleaded guilty.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my memory and ability.

2-6-14

Date and Place

Walla Walla, Wa .

99362

Michael L. Sublett

Michael Sublett

## VERIFICATION OF PETITION

I, Michael Sublett, verify under penalty of perjury that the attached petition is true and correct and filed on my behalf.

2-6-14  
Date and Place  
Walla Walla, Wa  
99362

Michael L. Sublett  
Michael Sublett

# ALSEPT & ELLIS LAW OFFICE

**February 11, 2014 - 8:04 AM**

## Transmittal Letter

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Cost Bill

Objection to Cost Bill

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**February 11, 2014 - 8:06 AM**

## Transmittal Letter

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Cost Bill

Objection to Cost Bill

Affidavit

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